IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 104 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDULGAFOOR MOHAMMAD HUSSAIN PATHAN
Versus
SUB-DIVISIONAL MAGISTRATE AND ANOTHER

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Appearance :
MS BANNA S DUTTA for Applicant.
RULE SERVED BY DS for Respondent No. 1.
MR ND GOHIL, APP for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 20/07/2006

ORAL JUDGMENT

By filing this petition, the petitioner has challenged the order of externment passed against him by Sub Divisional Magistrate, Gandhinagar on 30-8-2005, and the order of the appellate authority, i.e., State Government, passed in an appeal preferred by the petitioner

against the order of externment, by which the appellate authority has partly allowed the appeal of the petitioner and reduced the period of externment from one year to six months.

On behalf of Sub – Divisional Magistrate, Gandhinagar, a show cause notice was issued to the petitioner under Section 59 (1) of the Bombay Police Act, 1951 (hereinafter be referred to as “the Act” for short). In the said show cause notice, which is at Annexure-A, there is a reference to three cases lodged against the petitioner. So far as first case is concerned, the same is registered before Dehgam Police Station as Gunah Register No.60/2001 under Section 153 (A) 1-B, 294 and 506 (2) of Indian Penal Code. The second case is a chapter case registered at Dehgam Police Station being Gunah Register No.160/2001 under Section 107 and 151 of the Criminal Procedure Code. Third case is also registered before Dehgam Police Station being Gunah Register No.133/2004 under Sections 323, 504 and 506 (2) of the Indian Penal Code, which is dated 27-12-2004.

It is alleged in the show cause notice that the petitioner is a head-strong person and, therefore, atmosphere of danger is created in the area. In the show cause notice, it is mentioned that in order to prevent his activities, order under Section 56 (A) of the Act is required to be passed and, therefore, the petitioner was asked as to why he should not be externed for a period of two years from the areas mentioned in the show cause notice.

The petitioner gave reply to the aforesaid notice and pointed out that there is no basis for issuing show cause notice against him and the same is issued on some extraneous grounds. Sub Divisional Magistrate, Gandhinagar, thereafter, decided the externment proceedings by way of

Externment Case No.1/2005.

Before the Sub – Divisional Magistrate, it was submitted on behalf of the petitioner that he is an aged person and since he has filed some complaints against some persons, he is subjected to externment proceedings.

Sub Divisional Magistrate, Gandhinagar, ultimately by his order dated 30th August, 2005, came to the conclusion that the petitioner is in habit of filing false complaints and he is also in habit of instigating the people of the village, which may result into communal riots. The Sub Divisional Magistrate has also considered the statements of some witnesses, whose names have not been disclosed and, ultimately, an order under Section 57 (C) of the Act was passed, by which the petitioner was externed for a period of one year from Gandhinagar District as well as adjoining districts of Mehsana, Sabarkantha and Ahmedabad City as well as Ahmedabad Rural.

Being aggrieved by the said order, the petitioner has preferred an appeal before the State Government under Section 60 of the Act. The Under Secretary, Home Department has decided the said appeal by his judgement and order, which is at Annexure – D of the compilation. The Under Secretary, Home Department has partly allowed the appeal of the petitioner and the petitioner was externed from Dehgam City as well as Dehgam Police Station area of Gandhinagar District and the period of externment was also reduced from one year to six months.

Since the petitioner was not satisfied even with the order of the appellate authority, the petitioner has preferred this petition under Articles 226 and 227 of the Constitution of India.

Mr.N.D.Gohil, learned APP has submitted that now the period of externment is over and, therefore, nothing further is required to be done in this matter.

Even if that be so, since learned advocate for the petitioner has argued the matter on merits and since this Court was called upon to decide whether the order in question is legal and proper, this matter is disposed of by deciding the same on merits.

Ms.Banna Dutta, learned advocate for the petitioner submitted that the order in question suffers from total non-application of mind as show cause notice issued under Section 59 of the Act was in connection with proposed action of externment sought to be taken under Section 56(A) of the Act, however, ultimately, order of externment was not passed under Section 56 (A) of the Act but it was passed under Section 57 (C) of the Act. She further submitted that this point is also taken in the petition at Ground – C, but the State has not filed any reply to controvert that averment.

In fact, Section 56 and Section 57 of the Bombay Police Act deals with different situations for passing the order of externment. Section 56 and Section 57 of the Act reads as under :

> "56. Removal of persons about to commit offence.
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> Whenever it shall appear in areas for which a Commissioner has been appointed under Section 7 to the Commissioner and in other area or areas to which the State Government may, by notification in the Official Gazette extend the provisions of this section, to the District Magistrate, or the Sub-Divisional Magistrate

empowered by the State Government in that behalf (a) that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property, or (b) that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII of the Indian Penal Code, or in the abatement to any such offence, and when in the opinion of such officer witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regard the safety of their person or property, or (c) that an outbreak of epidemic disease is likely to result from the continued residence of an immigrant, the said officer may, by an order in writing duly served on him or by beat of drum or otherwise as he thinks fit, direct such person or immigrant so to conduct himself as shall seem necessary in order to prevent violence and alarm or the outbreak or spread of such disease or to remove himself outside the area within the local limits of his jurisdiction or such area and any district or districts or any part thereof contiguous thereto by such route and within such time as the said officer may prescribe and not to enter or return to the said area or the area and such contiguous districts or part thereof as the case may be from which he was directed to remove himself.

57.Removal of persons convicted of certain offences:

If a person has been convicted

(a) of an offence under Chapter XII, XVI or XVII of the Indian Penal Code, (XLV0 of 1860), or

(b) twice of an offence -

(i) under section 9 of the Bombay Beggars Act, 1945 (Bom XXIII of 1945) or under the Bombay Prevention of Prostitution Act, 1923 (Bom XI of 1923) or the Saurashtra Prevention of Prostitution Act, 1952 (Sau. VIII of 1952), the Hyderabad Suppression of Immoral Traffic Act, 1952 (Hyd. XLIX of 1952) the Madhya Pradesh

Suppression of Immoral Traffic Act, 1953 (M.P. III of 1952) or the Suppression of Immoral Traffic in Women and Girls Act, 956(CIV of 1956) or,

(ii) within a period of three years, under section 65 or 68 of the Bombay Prohibition Act, 1959 (Bom XXV of 1949)

(C) thrice, of an offence within a period of three years, under any of the provisions of the Bombay Prohibition Act, 1949 (Bom XXV of 1949) or under section 4 or 12A of the Bombay Prevention of Gambling Act, 1887 (Bom IV of 1887) or under section 4 or 12A of that Act as in force in the Saurashtra area or the Kutch area of the State of Bombay or under Section 4 of the Gambling Act or section 3 of the Public Gambling Act, 1867 (Hyd) I of 1305 F.III of 1867) as in force in the Vadarbha region of the State of Bombay)

the Commissioner, the District Magistrate or the Sub-Divisional Magistrate empowered by the State Government in this behalf if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted, may direct such person to remove himself outside the area within the local limits of his jurisdiction or such area and any district or districts or any part thereof contiguous thereto by such route and within such time as the said officer may prescribe and not to enter or return to the area or the areas and such contiguous district or part thereof, as the case may be from which he was directed to remove himself.

Explanation:- For the purpose of this section “an offence similar to that for which a person was convicted” shall mean -

(i) in the case of a person convicted of an offence mentioned in clause (a) an offence falling under any of the Chapters of the Indian Penal Code (XLV of 1860) mentioned in that clause, and

(ii) in the case of a person convicted of an offence mentioned in clauses (b) and (c), an offence falling under the provisions of the Acts mentioned respectively in the said clauses."

It is not in dispute that in the present case, in the show cause notice, which was issued under Section 59 of the Act, there is a reference to Section 56 (A), as against that Sub Divisional Magistrate, Gandhinagar has passed an order under Section 57 (C) of the Act. In fact, the proceedings were undertaken under Section 56 (A) of the Act and the order of externment is passed under Section 57 (C) of the Act. As per the requirement of Section 57 (C), person sought to be externed is required to be convicted thrice within a period of three years. However, in the instant case, the petitioner is not convicted in any of the offence as prescribed in the aforesaid clause and, therefore, naturally, it can be said that the proceedings undertaken against the petitioner are under Section 56 (A) of the Act. However, this is not a case of slip of pen or typographical mistake, as in paragraph 5 of the order as well as in the operative part of the order, the Sub Divisional Magistrate has mentioned that the order of externment is passed under Section 57 (C) of the Act.

Even though a contention is raised in this regard in the present petition, the same is not controverted by the respondents by filing any reply. Learned APP is also not in a position to controvert the fact that the order of externment is passed under Section 57 (C) of the Act, even though the notice was issued under Section 56 of the Act.

Considering the aforesaid aspect of the matter, it is clear that there is a total non-application of mind in passing the impugned order by the Sub Divisional Magistrate, as even though the proceedings have been initiated under Section 56 of the Act, the order of externment is passed

under Section 57 (C) of the Act, where the requirement for passing an order of externment is altogether different. Accordingly, there is total non-application of mind while passing the impugned order of externment. In that view of the matter, order of externment passed against the present petitioner is required to be quashed and set aside.

In view of what is stated herein above, this petition is allowed. Order of externment dated 30-8-2005 passed by Sub-Divisional Magistrate, Gandhinagar, against Abdulgafoor Mohammad Hussain Pathan, which is partly confirmed by the Deputy Secretary, Home Department, Gandhinagar is quashed and set aside. Rule is made absolute.

(P.B.MAJMUDAR, J.)

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